No. 78-1702

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOCIALIST WORKERS PARTY, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	8
Conclusion	15
Appendix A	1a
Appendix B	13a

CITATIONS

Cases:

Alexander v. *United States*, 201 U.S. 117	9
American Civil Liberties Union v. *Brown*, No. 78-1906 (7th Cir. June 7, 1979)	15
Bank Line v. *United States*, 163 F.2d 133	13
Black v. *Sheraton Corp.*, 564 F.2d 531	13
Franks v. *Delaware*, 438 U.S. 154	15
Halkin, In re, No. 77-1313 (D.C. Cir. Jan. 19, 1979)	10
Hampton v. *Hanrahan*, No. 77-1698 (7th Cir. Apr. 23, 1979), pet. for rehearing pending	15
Iowa Beef Processors, Inc. v. *Bagley*, No. 78-1855 (8th Cir. Feb. 7, 1979), cert. denied, No. 78-1281 (Apr. 16, 1979)	10
Kerr v. *United States District Court*, 426 U.S. 394	10
Maness v. *Meyers*, 419 U.S. 449	11

Cases—Continued	Page
National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639	12
Roviaro v. *United States*, 353 U.S. 53	14
Sawyer v. *Dollar*, 190 F.2d 623, vacated as moot, 344 U.S. 806	13
Schleper v. *Ford Motor Co.*, 585 F.2d 1367	9
Smith v. *Schlesinger*, 513 F.2d 462	13
Societe Internationale v. *Rogers*, 357 U.S. 197	13
United Artists Corp. v. *United States*, No. 78-1772, cert. denied (June 18, 1979)	8
United States v. *Hemphill*, 369 F.2d 539	10
United States v. *Nixon*, 418 U.S. 683	10, 11
United States v. *Reynolds*, 345 U.S. 1	12
United States v. *Ryan*, 402 U.S. 530	9
United States Board of Parole v. *Merhige*, 487 F.2d 25, cert. denied, 417 U.S. 918	10
Usery v. *Ritter*, 547 F.2d 528	10
Weatherford v. *Bursey*, 429 U.S. 545	14
Constitution, statutes and rules:	
United States Constitution, Fourth Amendment	15
28 U.S.C. 1291	9
28 U.S.C. 1292(b)	6
Fed. R. Civ. P.:	
Rule 37	13
Rule 37(b)	6, 7
Rule 37(b)(2)(A)-(C)	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is not yet reported. Prior opinions of the court of appeals are reported at 565 F.2d 19 (Pet. App. 28a-38a) and 510 F.2d 253.[1] The principal relevant opinion of the district court (Pet. App. 39a-82a) is

[1] A stay of this decision was denied. 419 U.S. 1314 (1974) (Marshall, Circuit Justice).

reported at 458 F. Supp. 895. The opinion reviewed by the court of appeals (Pet. App. 107a-111a) is reported at 458 F. Supp. 923. Prior opinion of the district court is reported at 387 F. Supp. 747. A related opinion of the district court is reported at 463 F. Supp. 515. Additional opinions of the district court (Pet. App. 83a-111a) are not reported. Other opinions of the district court are neither reported nor reproduced in the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on April 13, 1979. The petition for a writ of certiorari was filed on May 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in vacating the district court's order holding the Attorney General in contempt for declining to produce certain materials during discovery.

STATEMENT

1. Petitioners — the Socialist Workers Party (SWP), the Young Socialist Alliance (YSA), and several of their members—began this action in 1973. Their second amended complaint, alleging numerous abuses arising from the FBI's investigations of the Party over several decades, seeks injunctive relief and some $40 million in compensatory and punitive damages against the United States and various federal

officials. The case has not gone to trial, and the principal disputes to date have concerned the status and identity of informants who have given information concerning petitioners to the FBI.

In the district court petitioners received extensive discovery by means of interrogatories, depositions and the production of approximately seventy thousand documents from government agencies. Pet. App. 29a. They then sought, in addition to these materials, the names of all persons who have on at least two occasions furnished information on the SWP to the FBI. There are approximately 1300 such persons, and petitioners "have insisted that they would be satisfied with nothing less than the names of all informants." *Ibid.* The government argued that its ability to gather information for law enforcement purposes would be severely damaged by the requested disclosure. *Ibid.*

2. On May 1, 1977, the district court ordered the FBI to disclose to four of petitioners' counsel [2] the names and files of 19 informants,[3] selected by petitioners on the basis of the FBI's answers to interrogatories. When the government indicated reluctance to comply with this directive, the district court

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[2] One of the four attorneys is a member of the SWP.

[3] There are now 18 files in dispute. The government voluntarily furnished petitioners with the files of seven informants whose identities previously had been disclosed. A further file, one of the 19 subject to the disclosure order, also was supplied when it became clear that the identity of that informant had become public. Pet. App. 4a.

threatened to hold the Attorney General in contempt. The Attorney General then appealed and sought mandamus, seeking to avoid citation for contempt of court.

Despite recognizing that "some other circuits have taken a more liberal position with regard to the reviewability of interlocutory orders of the type involved herein," the court of appeals found itself "bound to follow [its] strong policy against review." Pet. App. 37a-38a. The court of appeals therefore dismissed the appeal and denied the petition for mandamus. In doing so, however, it pointed out that the identities of informants are presumptively privileged, that "[d]isclosure should not be directed simply to permit a fishing expedition * * * or to gratify the moving party's curiosity or vengeance," and that it was "far from convinced that plaintiffs' attorneys require a wholesale disclosure of informants' identities in order to prepare their case for trial." *Id.* at 33a-34a. Indeed, the court wrote, "[t]he activities of the informants have been extensively disclosed in the discovery already had, and most of the other proof necessary to establish plaintiffs' claim is already in plaintiffs' possession." *Id.* at 37a.

The court also observed that jurisdictional bars to petitioners' action might obviate the need for further discovery:

> Defendants argue forcibly that plaintiffs have no valid cause of action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, or the Constitution and rely in addition upon the two year statute of limitation contained in 28 U.S.C. § 2401(b) as a valid defense. These issues are not now before us but will be determined by the district court on the trial.

Pet. App. 36a. The court stated that "the identification of informants, once made, will be irreversible on an appeal from the final judgment" (*ibid.*) and that "a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial." *Id.* at 37a. Accordingly, the court expressed its hope "that the district judge will give full consideration to the thoughts here expressed." *Id.* at 38a. This Court denied the Attorney General's petition for certiorari. 436 U.S. 962 (1978).

Before this Court denied the petition, the district court renewed its insistence on the disclosure of the 18 files and warned again (Feb. 22, 1978 Tr. 27-28) that it would "seriously consider contempt or imprisonment of defiant officials" in the event of noncompliance. The day after this Court denied the petition, the Attorney General filed with the district court an affidavit respectfully declining to comply with the disclosure order on the ground that compliance would have a significantly detrimental effect on the government's law enforcement and counterintelligence efforts and would change the longstanding policy of the United States concerning the protection of informants.[4] The Attorney General explained that

[4] We attach a copy of the Attorney General's affidavit as Appendix A to this brief.

his obligation to protect the legitimate interests of the United States required him to obtain full appellate review of the disclosure order, even though that meant accepting sanctions under Fed. R. Civ. P. 37(b). The affidavit requested the district court to certify its order for appellate review pursuant to 28 U.S.C. 1292(b); it also suggested use of the sanctions, other than contempt, set forth in Rule 37(b)(2)(A)-(C)—*i.e.*, "concessions of certain facts or legal issues, or partial judgment in plaintiffs' favor." [5]

On June 30, 1978, the district court issued an opinion rejecting alternative sanctions and stating that continued noncompliance would result in a contempt citation against the Attorney General (Pet. App. 39a-82a). On July 6, 1978, after the Attorney General again declined to produce the files, the district court adjudged him in contempt (Pet. App. 107a-111a). On July 7, 1978, the court of appeals stayed this order pending appeal.[6]

[5] The government suggested three options: (1) that petitioners be allowed to establish from facts within their knowledge the amount of damages suffered by each SWP and YSA chapter and be given the benefit of a presumption that the damages were the result of informant activity; (2) that petitioners go forward with full discovery on the basis of the 12 informant files (the eight previously released, and an additional four that the government volunteed to release after obtaining the informants' consent) available to them and present the court with a "test case" of injury and damages, so that the court could determine more selectively which information in the files was necessary to determine the amount of actual damages; and (3) that, if neither of these alternatives was acceptable, the court and counsel should devise some other issue-related sanction (App. A, *infra*, 10a-12a; see also Pet. App. 16a).

Although the court of appeals held that the contempt adjudication is not appealable, it granted the petition for a writ of mandamus, vacated the contempt order, and directed the district court to consider issue-related sanctions under Rule 37(b). The court found the case to be of "extraordinary significance" because of the unprecedented nature and scope of petitioners' underlying arguments, the unprecedented number of informants potentially involved, and "the seriousness of a contempt citation against the Attorney General." Pet. App. 11a, 13a. The court recognized that, although mandamus is not always appropriate to review a contempt citation, that action "has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny [when imposed on the Attorney General] than such a sanction imposed on an ordinary litigant." *Id.* at 12a.

The court declined to review the underlying disclosure order, but it concluded that the district court committed clear error in determining that contempt was the only appropriate sanction for noncompliance. It explained:

[6] Petitioners have not reproduced this opinion. We reprint it as App. B, *infra*, 13a-24a for the Court's convenience.

> [H]olding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted.

Pet. App. 14a. The court of appeals rejected the district court's view that the files are "so central to the [petitioners'] case" that a citation for contempt is the only possible sanction. *Id.* at 17a. The court instructed the district court to produce for petitioners a set of "representative findings" from the informant files, designed to supply petitioners with "much of the information that they need to establish their claims or to propose other sensible sanctions, if any are needed without compromising the identity of the informants." *Id.* at 18a.

ARGUMENT

1. Petitioners' principal contention is that the court of appeals should not have reviewed the district court's order holding the Attorney General in contempt of court. According to petitioners, the decision violates the policy of avoiding piecemeal appellate review.

We do not quarrel with the general policy petitioners invoke. Indeed, both we and the Second Circuit honor that policy. See *United Artists Corp.* v. *United States*, No. 78-1772, cert. denied (June 18, 1979) (the Second Circuit dismissed an appeal from an order declining to quash a subpoena; our brief in opposition relied on the general rule that discovery

orders are not appealable). But it has long been accepted that, although orders concerning discovery are not appealable, a party may obtain review by refusing to comply, being held in contempt, and appealing from that decision. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Alexander* v. *United States*, 201 U.S. 117, 121 (1906); *Schleper* v. *Ford Motor Co.*, 585 F.2d 1367 (8th Cir. 1978). Such appeals pose some potential for delay of ongoing proceedings, but they are appropriate because they involve the contempt citation itself, not simply the discovery. The citation is a "final decision" under 28 U.S.C. 1291. And there is a built-in safeguard against appeals for the purpose of delay: although it is easy to appeal from a discovery order, no party can be sanguine about accepting a contempt adjudication in order to obtain appellate review. The party takes the risk that he is wrong and that the citation will be affirmed. This prospect confines appellate attention to the most serious cases in which a party most strongly believes that the district court has erred.

The Second Circuit stands alone in holding that a party cannot appeal as of right from a contempt adjudication. No court is more favorable in this regard to petitioners. The Second Circuit's issuance of mandamus in this case, far from creating a departure from accepted practice, simply achieved through a discretionary writ what any other court of appeals would have allowed by appeal. There is, consequently, no conflict among the courts of ap-

peals concerning the result in this case; every court would grant the Attorney General some form of review in a case such as this one.[7]

Moreover, the court of appeals' use of mandamus was appropriate under the principles governing the use of that writ. Mandamus is appropriate to control the discovery process in an "extraordinary situation." *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). Issuance of the writ in such cases lies largely in the discretion of the court of appeals. *Id.* at 403.[8] Whether that discretion was

[7] Indeed, as we argued in our petition for a writ of certiorari after the court of appeals declined to grant relief on the previous appeal (No. 77-1419, October Term 1977), we believe that the Attorney General is entitled to appellate review before being held in contempt. In this respect, the Attorney General is more like the President than like an ordinary litigant. See *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974). At least two courts of appeals would have granted review to the Attorney General without the need for a contempt citation. See *Usery* v. *Ritter*, 547 F.2d 528 (10th Cir. 1977); *United States* v. *Hemphill*, 369 F.2d 539 (4th Cir. 1966). If the Court should grant the petition in this case, we would urge this approach to appellate jurisdiction as an alternative ground for sustaining the court of appeals' judgment.

[8] *Kerr* cited with apparent approval a number of appellate cases issuing mandamus to control discovery in extraordinary situations. See, *e.g.*, *United States Board of Parole* v. *Merhige*, 487 F.2d 25 (4th Cir. 1973), cert. denied, 417 U.S. 918 (1974), cited at 426 U.S. at 405 n.8. Appellate decisions after *Kerr* continue to make use of mandamus when the situation demands. See, *e.g.*, *Iowa Beef Processors, Inc.* v. *Bagley*, No. 78-1855 (8th Cir. Feb. 7, 1979), cert. denied, No. 78-1281 (Apr. 16, 1979); *In re Halkin*, No. 77-1313 (D.C. Cir. Jan. 19, 1979).

abused is a fact-bound matter that need not be reviewed by this Court. And the discretion was not abused here.

As both Judge Gurfein (App. B, *infra*, 18a-23a) and the court of appeals (Pet. App. 9a-13a) pointed out, this is a unique case. Never before has an Attorney General been held in contempt of court. The citation for contempt placed the Executive and Judicial Branches in direct conflict; prompt appellate resolution of that conflict surely was in the public interest. Cf. *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974). Moreover, the Attorney General personally determined that the disclosure of the informants' identities would have a significantly detrimental effect on law enforcement (App. A, *infra*, 3a). He therefore declined to comply with the order for the express purpose of obtaining appellate review (*id.* at 7a-9a), because compliance with the order would disclose the information and make appellate review at some later time useless. See *Maness* v. *Meyers*, 419 U.S. 449, 460 (1975); see also Pet. App. 36a. As the court of appeals held, the district court committed a clear error in holding that sanctions other than contempt were not adequate. If there ever is a case in which review by mandamus is appropriate, this is that case.

2. Petitioners' further attack on the court of appeals' disposition of the sanctions issue does not require review by this Court. The selection of sanctions is committed to the district court's discretion in the first instance, reviewable by the court of ap-

peals for abuse of discretion. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The court of appeals applied that established rule to the particular circumstances of this case.

The court of appeals' disposition of the case is justified by several considerations. First, the Attorney General offered to accept an adverse judgment as the sanction for noncompliance (App. A, *infra*, 11a-12a). The entry of a judgment is an accepted means of testing a claim of governmental privilege.[9] A party always should be free to decide that the discovery sought by the plaintiff is worse than the relief on the merits. The object of a suit is the relief, not the discovery. If, for example, it would cost the defendant $10,000 to respond to the interrogatories filed in a suit seeking recovery of $100, the defendant always should be free to tender the $100 and rid himself of the discovery. The plaintiff should not be able to increase the stakes of a case, beyond the amount of his injury, by imposing an intolerable burden of discovery on the defendant. Yet, the Attorney General concluded, that is essentially what happened here: petitioners sought to impose on the government something (the disclosure of informants' identities) more harmful to the government than the monetary and injunctive relief sought in the complaint. The Attorney General, as attorney for the government, decided that he would

[9] That is how the privilege issue reached this Court in *United States* v. *Reynolds*, 345 U.S. 1 (1953).

accept a loss of the case (if need be) rather than provide the names. That decision should have been respected.

Second, as the court of appeals held, even the remedy of the entry of judgment for petitioners would have been needlessly severe. Rule 37 allows only "just" sanctions. A sanction is not "just" if some less severe one will do as well. And where, as here, the disobedience to the order is explained by a good faith belief that the order is harmful to the public interest (as well as by a good faith attempt to obtain appellate review), the district court has an obligation to select the least drastic adequate sanction. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 212 (1958). We rely in this respect on the court of appeals' detailed explanation of why sanctions less severe than adverse judgment or contempt are feasible here (see Pet. App. 16a-19a). Other cases also permit the government to accept issue-related sanctions. See, *e.g.*, *Black* v. *Sheraton Corp.*, 564 F.2d 531 (D.C. Cir. 1977); *Smith* v. *Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975); *Bank Line* v. *United States*, 163 F.2d 133, 137 (2d Cir. 1947).[10]

3. The court of appeals' disposition of this case is especially appropriate because there are infirmities in the underlying discovery order. This Court has

[10] Petitioners' reliance on *Sawyer* v. *Dollar*, 190 F.2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 (1952), is not warranted. *Sawyer* involved the government's failure to comply with a final decision on the merits, not an attempt to obtain appellate review of a claim of privilege in the discovery process.

held that the use of informants is essential to law enforcement, and that their identities should not be revealed without strong reasons. Even in a criminal case, the identities of informants should be revealed only when that is "essential to a fair determination of a cause." *Roviaro* v. *United States*, 353 U.S. 53, 61 (1975); see also *Weatherford* v. *Bursey*, 429 U.S. 545, 557 (1977). The privilege is stronger still in civil cases. See Pet. App. 33a (collecting cases).

In this case, the Attorney General has personally attested to the "significantly detrimental effect" of disclosure on the government's law enforcement and counterintelligence operations (App. A, *infra*, 3a). The district judge stated that he was "reasonably convinced that the *identity* of the [informants] in all, virtually all, cases would be almost useless to [him] as a judge or to the parties to the litigation." Pet. App. 20a (emphasis supplied). The identity of informants is not important to petitioners because the government has conceded that it used approximately 1300 informants over the periods in question, and "most of the other proof necessary to establish [petitioners'] claim is already in [petitioners'] possession." *Id.* at 37a. The nature and extent of the informants' activities also have been disclosed. Any further information that petitioners may need could be obtained under the procedure of "representative findings" proposed by the court of appeals, "without disclosing the identity of the informant." *Id.* at 19a. And there is no conceivable basis for the district court's holding (*id.* at 77a) that further discovery is necessary to shape

injunctive relief: even if the government's voluntary cessation of surveillance does not moot this part of the case, injunctive relief would simply be directed against future improprieties, and there is no need for petitioners to know the details of past ones.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

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[11] Petitioners' situation thus is quite unlike that of the plaintiffs in *Hampton* v. *Hanrahan*, No. 77-1698 (7th Cir. Apr. 23, 1979), pet. for rehearing pending, which petitioners contend is in "essential conflict" (Pet. 21) with the court of appeals' decision here. *Hampton* involved, among other things, a claim of unconstitutional search and seizure. The defendants relied on a warrant authorizing the search. The validity of the search warrant—and thus the existence of the plaintiffs' Fourth Amendment claim—hinged on the reliability of a particular alleged informant. Because the record indicated that there was considerable doubt about the informant's reliability—or, indeed, his very existence—the Seventh Circuit held that the plaintiffs' need for the information overrode the privilege (slip op. 61-62, 67). Cf. *Franks* v. *Delaware*, 438 U.S. 154 (1978). There is no such "serious factual controversy focusing on the existence or identity" (slip op. 67) of informants here. Indeed, in a more recent case in which the need for the identity of informants was less clear, the Seventh Circuit sustained a claim of privilege, citing the instant case with approval. *American Civil Liberties Union* v. *Brown*, No. 78-1906 (7th Cir. June 7, 1979), slip op. 6-7.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 3160 (TPG)

SOCIALIST WORKERS PARTY, *et al.*, PLAINTIFFS,

— *v* —

ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
DEFENDANTS.

AFFIDAVIT OF GRIFFIN B. BELL

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss.:

GRIFFIN B. BELL, being duly sworn, deposes and says that:

1. I am the Attorney General of the United States. I make this affidavit in accordance with my responsibilities under the Constitution and laws of the United States and in response to the order of this Court directing disclosure of the files, and thereby the identities, of eighteen informants to four attorneys who represent plaintiffs in this case. Each file contains the name of the informant who is the subject of the file as well as many factual details identifying that informant.

2. I have personally reviewed this matter, including portions of the informant file summaries examined by the Court and the passages of transcript

which I understand constitute the Court's explanation of the basis of this disclosure order. I make this affidavit based on personal knowledge and on information and belief. The sources of my information and the bases of my belief are statements and documents furnished me by other government officials in the course of their official duties. I have also received the recommendations of the Solicitor General, the Associate Attorney General, the Assistant Attorney General in charge of the Civil Division of the Department of Justice, the United States Attorney for the Southern District of New York, and the Associate Director of the Federal Bureau of Investigation. The Director of the Federal Bureau of Investigation has recused himself from acting in this matter because, prior to his appointment as Director, he sat as a member of the panel of the Court of Appeals for the Second Circuit which heard a petition for mandamus in this case.

3. The United States has a vital interest in maintaining the confidentiality of the names of informants who provide information to government authorities. Information received from informants has led to the apprehension and conviction of many criminals and has also been of major value in foreign counterintelligence matters. The continued flow of information from informants to authorities rests on the confidence of informants that their identities will not be revealed unless they consent to such revelation. The important governmental interest in the confidentiality of informants' identities led to the establish-

ment in our law of the informant privilege which has been recognized in many cases including the Court of Appeals' opinion in this case. *See* 565 F.2d at 22. The scope of the informant privilege has been litigated most frequently in criminal cases, in which the Government retained the option voluntarily to withdraw the charges if the court ordered disclosure of the identity of an informant who declined to consent to such disclosure. In civil cases as well, however, the Government has been prepared to submit to appropriate sanctions under Rule 37 of the Federal Rules of Civil Procedure rather than disclose informants' identities. *See Usery* v. *Ritter*, 547 F.2d 528 (10th Cir. 1977); *United States* v. *Hemphill*, 369 F.2d 539 (4th Cir. 1966).

4. The informant privilege is fully applicable to the eighteen files which are the subject of this Court's order. This conclusion has also been accepted by the Court of Appeals for the Second Circuit. *See* 565 F.2d at 22.

5. Releasing these eighteen files to plaintiffs' counsel would have a significantly detrimental effect on law enforcement by undermining the pledge of confidentiality which the FBI makes to informants, which pledge its agents made in this case. Such action would signal to other informants and potential informants that the United States would not or could not continue to honor the pledge of confidentiality which has been the cornerstone of its relationship with informants, thereby adversely affecting the ability of other law enforcement agencies, such as

the Internal Revenue Service, the Drug Enforcement Administration, the Secret Service, the Postal Inspection Service, the Bureau of Alcohol, Tobacco and Firearms, the Immigration and Naturalization Service, the Securities and Exchange Commission and the Department of Labor, to attract and maintain sources of information. Release of these names here and in other cases under similar circumstances would also tend to deter potential and actual foreign counterintelligence informants from cooperating with the United States. The resulting diminution of information and the effect on law enforcement and foreign counterintelligence would, in my judgment, be substantial.

6. The Government is a party to many cases in which issues are raised relating to privileged information. Such cases include several cases similar to this case as well as many cases brought under the Freedom of Information Act. In such cases District Judges might well expect the Government to follow any procedure accepted here. The result would be that this procedure of furnishing opposing counsel with informants' identities could easily become the routine first step in the litigation of governmental privileges.

7. If the long standing policy of the United States concerning the protection of informants is to be changed, such changes should operate prospectively and should be directed, I believe, by the legislative or the executive branch of government, rather than as a retroactive by-product of Government compli-

ance with this Court's discovery order. In this regard Executive Order 12036 (Jan. 24, 1978) on foreign intelligence activities, the Attorney General's Guidelines on Use of Informants in Domestic Security, Organized Crime and Other Criminal Investigations, dated December 15, 1976, and the Attorney General's Guidelines on Domestic Security Investigations, dated April 5, 1976, have attempted to codify, clarify and modernize our policy in this area. The United States Senate and House of Representatives have devoted substantial effort to an examination of past and current practices concerning the Government's use of informants as well as to the question whether legislative reform is needed.

8. The Court has noted a "serious question as to whether the bulk of those FBI activities [use of informants in the investigation of plaintiffs] had any valid law enforcement purpose" and has noted that these particular informants did not report any unlawful activities by the plaintiff organizations. The Court has also referred to the fact that this investigation has been terminated. Acceptance of such factors as reasons for disclosure would undermine any informant's expectation of confidentiality because at the beginning of an investigation, when the informant must decide whether to cooperate with the government, it is impossible for the informant to be sure whether that informant, another informant or another investigative technique will discover any criminal activity or a threat to national security, and whether, if so, the appropriate officials will de-

cide to prosecute the case. Indeed, many cases are not brought because the government officials know that prosecuting the case would require revelation of informants who will not consent to such disclosure or whose value as continuing sources of information outweighs the value of a particular prosecution. A policy of revealing informants in discontinued investigations would also undermine the reliability of informant information since it would provide informants with an incentive to report inaccurately in order to preserve their anonymity. It would also discourage government officials from terminating investigations which had become of marginal utility. Such a policy would also be unfair to informants who had participated in an investigation based on a pledge of confidentiality only to have the government renege on its promise because of some retroactive finding that the investigation was unnecessary or unjustified for reasons entirely outside the informant's control.

9. The Court has also observed that "there may be a variety of tortious acts which were committed by the FBI, including trespass and conversion of property. The latter refers to the removal of private documents for production to the FBI. The FBI and certain informants may have engaged in activities designed to intentionally destroy certain chapters of the SWP and YSA." (May 31, 1977 at 15-16). Surely this observation constitutes no basis for a blanket release of eighteen identities, including those of informants whose files contain no suggestion that they were involved in any such conduct, prior to de-

ciding the jurisdictional and other legal issues relating to these claims.

10. The Court has also referred to a supposed distinction between these informants and those engaged in other types of investigations. The Government simply cannot acquiesce in a retroactive decision by the District Court to accord national security informants' identities less protection than that provided other informants.

11. The fact that the Court's order would release these files and identities only to plaintiffs' attorneys does not provide adequate protection to the important Government interests here. Informants rely for the security of their identities on the commitment and ability of government agencies and officials, not on attorneys who may in the future come to represent the target of the investigation. In my judgment the procedure embodied in the Court's order would create a significant danger of purposeful or inadvertent release of identities to unauthorized persons. The Court of Appeals has specifically questioned this Court's conclusion to the contrary. 565 F.2d at 24 n.

12. The Government has been unable to obtain appellate review of the merits of this Court's disclosure order. Although the Court of Appeals for the Second Circuit expressed its concern "that the course upon which the District judge has embarked will lead to disclosure for which there is no substantial need . . . and to unnecessary rummaging in government files" 565 F.2d at 23, it concluded that this Court's order is unreviewable at this stage of the

case. The Supreme Court denied the Government's petition for certiorari seeking review of the question whether appellate review of this disclosure order may be obtained through any procedure other than the Government's declining to comply with the order. In addition, this Court has deferred or decided only tentatively certain legal issues critical to the sufficiency of plaintiffs' claims attacking informants. Consequently those issues as well as others determinative of this Court's jurisdiction to entertain such claims have never been subjected to appellate review either by the Court of Appeals or the Supreme Court. This Court has declined to certify these issues as well as the correctness of this disclosure order for appeal pursuant to 28 U.S.C. § 1292(b). Instead, this Court has offered the Government a proposal by which the number of identities to be disclosed would be reduced from eighteen names to nine names if the Government would agree to forfeit its right to appeal the correctness of the disclosure decision.

13. Under these circumstances, the only way for the Government to obtain full appellate review of this Court's order, which I believe to be erroneous and about which the Court of Appeals for the Second Circuit expressed grave reservations, is to decline to comply with the order and accept sanctions under Rule 37 of the Federal Rules of Civil Procedure. The Government could then take an appeal from whatever final judgment this Court imposes. Compliance with this Court's order that the eighteen names be disclosed would render the issue moot since

the names would no longer be confidential, thus depriving the Government of its right of appeal.

14. I have the utmost respect for this Court. This procedure, obtaining appellate review on the merits by accepting sanctions under Rule 37, does not constitute definance of a court order. It is a recognized procedure invoked from time to time by the Government in order to protect privileged information. Accepting sanctions to preserve the Government's right to full appellate review is in furtherance of my respect for the law. My only alternative is to authorize action which would sacrifice important Government interests on the basis of an order which may be declared erroneous whenever full appellate review can be obtained.

15. I authorize release to plaintiffs and their counsel of the files and identities of of four informants, designated 6, 220, 1123, and 1321, under an appropriate protective order limiting use of this material to proper purposes in this litigation, with the names of other informants and matters not related to plaintiffs deleted. These four informants have consented to the release of their identities for this purpose. This release would give plaintiffs access to a total of twelve informant files, these four plus eight files previously released because of various circumstances not here relevant.

16. I respectfully decline to authorize release of fourteen of the eighteen files. These files include the nine files which this Court has found are not essential to plaintiffs' preparation and trial of their case, num-

bers 73, 162, 176, 317, 675, 1007, 1121, 1211, and 1350. They also include the identities of five other informants who have declined to consent to release of their identities. They are numbers 53, 148, 306, 311 and 616.

17. I believe that the proper course concerning these fourteen informants is for this Court to certify for appellate review, pursuant to 28 U.S.C. § 1292 (b), the question whether this Court's order directing such disclosure, prior to a decision of the fundamental legal issues involved, is correct. The Court should also decide and certify these fundamental legal issues. Alternatively, I believe that the Court should proceed to a trial of the case on plaintiffs' claims unrelated to informant activities, along with their claims related to the twelve informant files to which they would have access. The Government would stipulate to or concede many facts concerning its use of informants in the investigation to the extent such action would not compromise informants' identities. Plaintiffs could also present whatever proof they now have or could obtain concerning how informants damaged them. The Court might also find that *ex parte* questioning of an informant or contact agent by either the Court or a Magistrate might be helpful. In short, the Government is willing to participate in any reasonable procedure which does not compromise the security of the identities of informants who do not consent to the release of their names. After this trial, the Court could take up the question whether sanctions pursuant to Rule 37 are appropriate and,

if so, what sanctions are proper. By this final stage of the case, the Court would have decided many threshold legal issues determinative of the Court's jurisdiction to entertain plaintiffs' informant claims and whether plaintiffs' allegations constitute a cause of action. A decision in the Government's favor on any of several such issues would eliminate many, if not all, the informant problems in the case. This procedure was suggested by the Court of Appeals which said "In this case, which will probably be tried without a jury, . . . a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps disposition of the need, are decided on trial." 565 F.2d at 24 (citations omitted) Either of these courses, certification or trial, would allow the Government to obtain full appellate review. In my opinion, these approaches constitute viable accommodations between the Government's interests in confidentiality of informants' identities and whatever legitimate claims plaintiffs may have.

18. The necessity for the Government to take sanctions in order to preserve the right to appeal is avoided if this Court grants certification pursuant to § 1292(b). If this Court adheres to its denial of certification, requiring the Government to submit to sanctions in order to preserve its right to appellate review, I believe that appropriate sanctions would be the sanctions set forth in Rule 37(b)(2)(A)-(C), consisting to concessions of certain facts or legal issues, or partial judgment in plaintiffs' favor. The

correctness of the Court's disclosure order including the underlying legal issues, as well as the propriety of the sanctions, could then be the subject of a full review on appeal from any final judgment.

19. In my opinion, contempt is not an appropriate sanction in this matter. This is not a decision which FBI officials, any other Government officials, or I have made in a spirit of defiance of court orders or out of a contemptuous attitude toward this Court or its authority. Rather, I make this decision, as stated, for this Court's authority, and based on my assessment of my duty as Attorney General to protect the legitimate interests of the United States.

WHEREFORE, concluding that the eighteen files and identities herein are privileged, and waiving that privilege with respect to four of said files and identities, subject to the limitations set forth in Paragraph 15 above, I must respectfully decline to release fourteen of the informants' files and identities.

/s/ Griffin B. Bell
GRIFFIN B. BELL
Attorney General

Sworn to before me this 13th day of June, 1978.

/s/ Audrey J. Williams
AUDREY J. WILLIAMS

My Commission Expires March 14, 1979.

APPENDIX B

[No Caption]

(Decision of the Court.)

JUDGE GURFEIN: As I indicated earlier, I have had a chance to read the briefs of both parties and study the cases that they have cited. The reason I am delivering an oral opinion is that there is a legitimate public interest in this case because it involves a sharp conflict between the civil rights of a political party which allegedly has been harmed by a series of allegedly illegal excursions by the FBI, and at the same time the government has a great interest in protecting its informants against unnecessary disclosure.

This case, in a sense, is an historic confrontation, for the government until recent years has rarely been a party to a suit charging a violation of constitutional rights.

In this case we have listened to the history, as it was given by both sides, of the proceedings thus far in the District Court. There was an order, generally speaking, to the FBI to furnish 18 files of informants to the Court for an in camera inspection, with the participation of the attorneys for the plaintiffs, as well as the attorneys for the defendants.

Those 18 files, as Judge Griesa indicated, might, but probably would not, involve the similar disclosure of up to 1,300 informants' files which the FBI had.

Without going into the details of the thrust and counterthrust of what the parties said before the

District Court, suffice it to say that the order was appealed by the defendants to the Second Circuit, that is to this Court, and, as I read the decision of the Court in 565 Fed. 2d 19, all that the Court decided was that at that stage of the proceeding, with the only thing outstanding being an order to produce document, it was an interlocutory order, which is not appealable.

The Supreme Court denied certiorari, that is, denied review, three Justices dissenting from that denial. Since then, however, there has been another step in the case, and that is the decision of Judge Griesa on June 30 to hold the Attorney General of the United States, Judge Griffin Bell, in contempt of court, unless by today he provided the files ordered by the Judge to be produced, including the identity of the informants.

As I understand it, by a telephonic conference yesterday with the Judge, who is in California, in which Mr. Leonard Boudin, the chief counsel for the plaintiffs, participated together with Mr. Fiske, the United States Attorney, the Judge decided that since the Attorney General had manifested his intention not to comply, he was then and there, meaning yesterday, holding the Attorney General of the United States in contempt of court. So the case comes before me today with that as an actuality. The Attorney General of the United States is now in contempt of the District Court for the Southern District of New York.

The United States has filed an appeal to this Court, and what it seeks today is a stay, pending the determination of that appeal, of two things: one, the original order for disclosure; two, the actual contempt itself within the context of that order; and, further, the question of whether there are not other sanctions possible under Rule 37 of the Federal Rules of Civil Procedure, rather than a contempt citation, as such.

As I say, the case is of great public interest, and yet the issues involved are highly technical, even for members of the bar who are not particularly familiar with the federal practice. So I shall try to explain what it is about in as simple terms as I can muster.

The general rule in the Federal courts is that there is no appeal until a final judgment in a civil case. This rule goes back to the Act of 1789, the first Judiciary Act which the first Congress enacted, and it has been the rule ever since. The reason for it is not far to seek, and that is, if people could keep running up to the Court of Appeals all the time while proceedings are going on below, it would be easy for somebody so disposed to upset the proceedings that were ongoing at the time.

But this general rule of finality is sometimes abrogated. In the famous case of Cohen vs. The Beneficial Corporation, which is in 337 United States, the government said that in certain exceptional cases which were independent proceedings and which would not be merged in the final judgment and where it

might be too late for the appeal to have any beneficial effect, an interlocutory appeal might be allowed.

In this case we do not deal with a generality, however. We deal with a rather circumscribed type of procedure, and that is the procedure of contempt.

There are two kinds of contempt. One is a criminal contempt and the other is a civil contempt. The criminal contempt is actually a punishment for defying an order of a court and is imposed by way of fine or imprisonment, generally, to vindicate the dignity of the court. A civil contempt, on the other hand, is an adjudication of contempt or an order of contempt to compel the respondent either to testify or to produce documents. If he does, he purges himself of the contempt. He is only in contempt until he obeys, and that has led to the saying that in a civil contempt, he has the keys to the jail door in his own pocket.

There is no question in my mind here that this is not a criminal contempt adjudication against the Attorney General, but that it is clearly a civil contempt, an attempt to coerce him to obey the mandate of the District Court, and it is a contempt directed at Judge Griffin Bell as a person. There is no institution that is being coerced. It is the person of a flesh and blood human being, which is important in this case.

The ground of refusal by the Attorney General to obey the order of the District Court was that the government has what we call an informer's privilege. That is a privilege of ancient duration, going way

back to the English practice where it was recognized that law enforcement, the security of the crown, the security of the nation, requires the protection of certain types of informants who otherwise would be subjected to the risk of reprisal and who also might be induced not to cooperate in future cases.

The Supreme Court dealt with this subject in a rather well known case called Roviaro vs. The United States in 353 United States, and there the Court said that the informer's privilege is really the government's privilege. That was a criminal case, and, as I indicated in the colloquy, involved an informant who had actually been engaged in a narcotics transaction and where it was vital for the defendant to have his identity disclosed.

There is no doubt, however, as the Court recognized in Roviaro, that there is a serious conflict between the civil rights of citizens and the rights and privileges of the government in pursuing law enforcement and security in terms of the protection of its informants. So what we glean out of the Roviaro case is that it is not only relevancy that determines the matter, but also the essential need, as it was put, for the informant's disclosure.

I need hardly say again that I am not concerned with the merits here. It is not my function nor within my power. All I have to determine today is whether the finality rule so inhibits the government from an appeal that it makes such an appeal almost illegitimate.

It is true, as the argument was made by the able counsel for the Socialist Workers Party, Miss Winter,

that normally in a civil case, where an order of civil contempt is made against a party to that case, it is not an appealable order. On the other hand, it is equally clear that if a person who is not a party to the proceeding is ordered to produce or to give testimony and is held in contempt, he may appeal, although in some cases he may have to wait for an actual sanction to be imposed before he gets that right to appeal.

So the question in my mind is, is Attorney General Griffin Bell really a party to this proceeding?

We were informed in the Cohen vs. Beneficial case, which I mentioned, that practical rather than technical constructions should govern us on the issue of whether something is an appealable order.

It seems to me in this case that since the present Attorney General, Bell, was not involved at all in any of the alleged torts that were committed or the alleged violation of civil rights, he is really a nominal defendant, only in the most technical sense of the word. The suit is really against the United States and against various officials and agents of the United States.

In what respect, then, is the Attorney General Bell required to respond? The answer, it seems to me, is not because he is a custo n of records, as such, but because he is the lawyer for the United States who has given the advice, based apparently—surely, I should say—on his own good faith and belief that to turn over the informers' files as requested, as directed by Judge Griesa, would do incalculable harm

to the government of the United States; so that I consider him as a person who is asserting a legal claim on behalf of the United States, no different than the position that Mr. Robert B. Fiske, Jr., himself is in as the United States Attorney for the Southern District of New York.

If we treat Attorney General Bell as a person, as the chief attorney for the government, the Eighth Circuit Court of Appeals has recently held that a lawyer for a party is not a party in terms of the appealability of a civil contempt order. In that case, in re Murphy, which is found at 560 Fed. 2d, the lawyer involved in the contempt was a private lawyer for one of the parties in a civil action.

In this case we have the Attorney General, who is not only a lawyer, but also a representative of the President of the United States, for it is the United States that is being sued, and the Chief of the Executive Branch is, to be sure, the President.

I hasten to say that in the normal court proceeding, the government is entitled to no special privileges beyond that of the ordinary citizen, and that remains true. But when we discuss matters of institutional confrontation between the highest echelons of the Executive Branch and the Judiciary, even though it may not be a constitutional confrontation, we are talking in terms of the separation of powers and other fundamental considerations of our government as it is constituted.

The best analogy that I can find is to the situation that arose in connection with the so-called Nixon

tapes. In that caes, as you will all recall, Judge Sirica of the District Court for the District of Columbia ordered the President of the United States, Richard Nixon, to produce for in camera inspection the tapes which he had taken in the White House. The President appealed the order. Mind you, he had not yet been cited for contempt, although it was rather obvious that that would be the next step.

The Court of Appeals for the District of Columbia and ultimately the Supreme Court of the United States held that an appeal would lie, and the reason was given by the Supreme Court in 418 United States at 691 in the following language:

> "Here, too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court, merely to trigger the procedural mechanism for the review of the ruling, would be unseemly and would present an unnecessary occasion for constitutional confrontation between two branches of the government.
>
> "Similarly, a Federal judge should not be placed in the posture of issuing a citation to a President, simply in order to invoke review."

As I have indicated, of course, Judge Bell is not the President of the United States, but I think there is a close enough analogy as a matter of common sense to recognize that this is an exceptional case.

The issue is not whether ultimately the Attorney General may not be held in contempt. That is not before us. The issue is simply whether sufficient has gone forward in the District Court by the finding of contempt against the Attorney General to permit an appeal from that contempt order to be taken.

It is obvious in this case that it goes in a sense beyond the Nixon tapes because it deals with an informer's privilege. Here, as has been indicated, if the informer's identity is revealed and a court subsequently holds that that was error, it will be too late in any sense to repair what would then have been found to have been damage.

So it seems to me that there is enough precedent here to favor an appealability of Judge Griesa's contempt order in terms of the exceptional nature of the case, recognizing, as I do, that this is a very important case and that the issue of the civil rights of a political party which claims that it is a peaceful party, with no record of violence, is an important issue, ultimately to be decided in the proper forum.

Again, I repeat that I do not prejudge the merits in any sense. I decide simply that there is merit in Mr. Fiske's argument that the government has the right to appeal.

I also should add that although this is an order apparently ordering the Attorney General to deliver the files in the presence of Mr. Boudin, the chief counsel for plaintiffs, I should add that my present ruling is not a reflection of any kind on the lawyers involved, not on Mr. Boudin or on any of his staff.

The assumption is that they would obey the Court's order and keep their knowledge to themselves. I cannot be as sanguine, however, in believing that some further efforts would not be made to subpoena the informants whose identies were revealed.

Indeed, as the Court indicated in an earlier case, it is tough on a lawyer to have to face this responsibility of knowing the names of informants that he is under a court order not to disclose.

A valiant argument was indeed made by Miss Winter to the effect that this is not an organized crime case, and I agree. But the law is structured in such a way that one decision may serve as a precedent for another, and there is no doubt that until the appellate courts straighten out this entire question of informer's privilege, that it is perfectly true that giving up that privilege too easily may in certain cases result in assassination and death. We have seen that, unfortunately, even in this Circuit.

Indeed, it may well be that in terms of the public security, the divulging of names may in time destroy a counter-espionage activity that may be very important to security. That is, I am not assuming, as I indicated, that this is the case, but I simply state that in terms of the general possibilities and the importance of the issue presented.

In my own opinion, therefore, the matter is too delicate to foreclose appeallate review at this stage of the game. Everybody will be better off if there is appellate review. The plaintiffs, if they win, will have a solid base on which to proceed in their case;

if they lose we will have prevented an untimely spilling of the beans in a situation that does not require it and which is irreparable in its terms.

I note also that these alleged wrongful acts stem from the year 1938, forty years ago, and go on until the 1970's, I believe. So the claim of urgency, while not to be disregarded, must also be balanced by the importance of the issue involved.

In the meantime, as I have indicated, I believe that discovery should proceed in other ways, and I know that Judge Griesa and the lawyers are keen enough and ingenious enough to figure out ways of not letting the case stall in dead center while the appeal is being heard.

I repeat again, for the benefit of the plaintiffs' counsel, that I am not holding—for it is not within my province to do so, even if I wanted to—that an attorney General of the United States can never be held in contempt. I am simply saying that when he is held in contempt, as in this case, he ought to have a quick right of appeal.

As I have indicated, I will grant a stay of the order of contempt, together with such other orders for discovery as may be involved in the appeal, pending the argument of the appeal. At that time the United States may make a further request to the panel then sitting for an extension of the stay until a final decision is reached by the Court.

In view of the finding that I have made that this is an appealable order, in my judgment, and cer-

tainly sufficiently so to permit a stay to be entered, as I have done, I will not address the question of extraordinary writ of mandamus, which the government has sought in the event that I deny the stay.

If there is nothing further, the Court will stand in recess, and I will sign an order today.

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